

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3 MIRIAM MARTINEZ-SOLAIS, on behalf ) CASE NO. 1:15CV227  
4 of herself and all others )  
5 similarly situated, )  
6 )  
7 Plaintiff, )  
8 )  
9 vs. )  
10 ) Greensboro, North Carolina  
11 VESUVIO'S II PIZZA & GRILL, INC., ) June 29, 2015  
12 and GIOVANNI SCOTTI D'ABBUSCO, ) 9:58 a.m.  
13 )  
14 Defendants. )

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15                   TRANSCRIPT OF THE **INITIAL PRETRIAL CONFERENCE**  
16                   BEFORE THE HONORABLE L. PATRICK AULD  
17                   UNITED STATES MAGISTRATE JUDGE

18 APPEARANCES:

19 For the Plaintiff: GILDA A. HERNANDEZ, ESQ.  
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22 For the Defendants: DENISE SMITH CLINE, ESQ.  
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Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

## P R O C E E D I N G S

**THE COURT:** All right. Next up we have 1:15CV227, Martinez-Solais versus D'Abbusco. I have listed Gilda Hernandez on behalf of the Plaintiff and Denise Smith Cline on behalf of the Defendant. If you all would come forward.

**MS. HERNANDEZ:** Good morning, Your Honor, Gilda Hernandez on behalf of the Plaintiff, Miriam Martinez-Solais, and with me is my paralegal, Sylvia Nelson, who is also here to take notes.

**MS. CLINE:** Good morning, Your Honor, Denise Cline for the Defendants.

**THE COURT:** All right. This matter is on for an initial pretrial conference. If you all would just bear with me for just a moment. I believe each of the parties has filed an individual report, and I have reviewed those.

Ms. Hernandez, would you summarize for me what you suggest are the issues that are in dispute as it relates to the establishment of a scheduling order. I know there are some other matters that perhaps we'll at least make reference to later, but just focusing on the issue of the scheduling order at this point.

**MS. HERNANDEZ:** Well, Your Honor, the main difference is -- in terms of the scheduling order, is that Plaintiffs feel that rather than --

**THE COURT:** If you would, stand up, please.

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1           **MS. HERNANDEZ:** I'm sorry, Your Honor, absolutely.

2           In terms of the scheduling order for the Plaintiff,  
3 it makes more sense to go ahead and brief the motion for  
4 conditional certification, which has already been filed, which  
5 is Docket 14, allowing the parties to go ahead and finish the  
6 briefing, which would already be done before the 45-day period  
7 as proposed by opposing counsel; and then, thereafter, if the  
8 Court determines that the motion for conditional certification  
9 and notice should be granted, at that point the notice would be  
10 sent to the Putative Plaintiffs in this case, giving them an  
11 opportunity to participate to opt into the action. And then  
12 once the opt-in period expires, then at that point it would be  
13 determined how many people are actual party plaintiffs in the  
14 action.

15           Right now, we have one Named Plaintiff and one Opt-In  
16 Plaintiff; and, therefore, at that point we'll know how many  
17 are total party plaintiffs, and then the parties will have 30  
18 days to go ahead and potentially resolve the matter; and if the  
19 matter cannot be resolved, then the parties would go ahead and  
20 negotiate a second case management discovery plan that would  
21 affect the number of opt-in plaintiffs, subject to discovery  
22 and how many requests for interrogatories, production of  
23 documents, and so forth, Your Honor.

24           So that's really the only distinction between the two  
25 parties in terms of the case management plan.

1           **THE COURT:** And setting aside the issue of whether,  
2 in connection with conditional certification, the Defendants  
3 could have discovery on a -- some sort of equitable grounds to  
4 oppose certification, what about their right to have discovery  
5 about sort of the factual issues that might bear on conditional  
6 certification? Is there not some authority that there could be  
7 discovery about that issue, about whether there are  
8 commonalities that would warrant a collective action?

9           **MS. HERNANDEZ:** That's a very good question, Your  
10 Honor. Under the Fair Labor Standards Act, you have an initial  
11 notice, and it's a very lenient standard. So if Your Honor  
12 were to determine that there should be some discovery that  
13 should be done prior to, you know, deciding on whether the  
14 motion for conditional certification should be granted, it  
15 should only apply to the actual individuals that have opted  
16 into the action and the Named Plaintiff, those two individuals  
17 only.

18           Yet, what Defendants' counsel is proposing, and it  
19 may be just a lack of understanding of how these actions  
20 operate -- Putative Plaintiffs are not part of the discovery  
21 process, and, yet, Defendant -- and this has been raised  
22 numerous times, Your Honor, which is why there was a subsequent  
23 motion for protective order that was filed on the 26th of June,  
24 because those are some serious accusations against Plaintiff's  
25 counsel personally, that somehow there have been improprieties

1 with respect to -- I'm sorry, improper solicitation with  
2 respect to Putative Plaintiffs with promises of pecuniary gain  
3 and promises of immigration services.

4           In the context of conditional certification, what you  
5 are looking at is simply are there putative plaintiffs that can  
6 potentially be similarly situated to the Named Plaintiff with  
7 respect to the common pay practice that's being alleged by the  
8 Named Plaintiff. The Named Plaintiff has alleged that not only  
9 she, but every other kitchen employee, was paid a nonfixed  
10 salary or hourly basis, was not paid properly the minimum wage  
11 and the overtime. We already have one Opt-In Plaintiff who  
12 has, you know, basically corroborated those allegations, and  
13 because there aren't that many -- we are not talking about 20,  
14 30, 40. We are talking 10 to 15 employees. One additional  
15 opt-in plaintiff should be more than sufficient to meet the  
16 lenient standard for a motion for conditional certification be  
17 granted.

18           But again, Your Honor, the -- there are two important  
19 points here. One is that at this juncture, it would be very  
20 beneficial to allow the Putative Plaintiffs to receive accurate  
21 and timely notice of this action, where they are advised that  
22 they have nothing to fear with respect to retaliation because  
23 of the background of this case, Your Honor.

24           In this case -- this case was supposed to be filed in  
25 federal court on January 19, 2015, but during the interim, the

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1 parties, not with this Defendants' counsel, but a former  
2 counsel -- the parties were actually engaged in settlement  
3 negotiations; and, yet, during the course of that time period,  
4 when Defendants' counsel specifically asked Plaintiff's counsel  
5 to stand down, not file a complaint in federal court for two  
6 weeks, and no later than February 2, 2015, the Defendant had  
7 the Plaintiff arrested, incarcerated. And it was -- it all led  
8 up to -- it began with threats of intimidation, coercion,  
9 threats that started with messages that were relayed to the  
10 Plaintiff's sister-in-law, stating that if she did not drop  
11 this action for unpaid wages, that she was going to be arrested  
12 and potentially deported from this country and that he had  
13 already hired a private investigator and had confirmed her  
14 immigration status, and, thus, she had no rights under the Fair  
15 Labor Standards Act to pursue in this action.

16           So following all of those accusations and threats, I  
17 immediately contacted the Defendant's wife and the Defendant  
18 and asked them to cease further threats as such threats were  
19 illegal under the Fair Labor Standards Act, Section 15(a)(3),  
20 and, yet, the threats continued; and then in the middle of  
21 January of 2015, I was contacted by a former Defendants'  
22 counsel, who, again, like I said, asked me to stand down, wait  
23 for two weeks, and then Plaintiff was immediately arrested on  
24 January 28. Very, very serious circumstances, Your Honor.

25           And even after the arrest, the Opt-In Plaintiff was

1 still working for the Defendant, and there was an investigation  
2 conducted by the United States Department of Labor with respect  
3 to retaliation complaints and was in the establishment  
4 conducting an investigation, and the Opt-In Plaintiff was  
5 instructed to lie to a government official about the pay  
6 practices and what have you.

7           So there is so much just horrible things that have  
8 happened to the Plaintiff and Opt-In Plaintiffs and Putative  
9 Plaintiffs, Your Honor, that at the outset of this litigation,  
10 it makes sense to potentially grant this motion for protective  
11 order so that it levels the playing field, Your Honor.

12           **THE COURT:** All right. I guess my question, though,  
13 was whether or not there could be discovery that is relevant to  
14 the issue of conditional certification or not. What is your  
15 position on that?

16           **MS. HERNANDEZ:** As I said, Your Honor, if the Court  
17 determines that there should be some discovery prior to the  
18 briefing on the motion for conditional certification, which  
19 there is a plethora of authority that a motion for conditional  
20 certification can be determined on the basis of the Plaintiff's  
21 complaint and just a couple of declarations -- but, you know,  
22 there are some courts that also believe there could be a little  
23 bit of precertification discovery, but if that's the way the  
24 Court is considering -- or seriously considering that option,  
25 it should only be limited to the party Plaintiffs, and we are

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1 talking about the Named Plaintiff and the Opt-In Plaintiff and  
2 not Putative Plaintiffs, especially to what, you know, the  
3 Defendants' counsel has already suggested are going to be  
4 nothing more than declarations to somehow, you know, accuse  
5 Plaintiff's counsel of engaging in improper solicitation.

6 **THE COURT:** Setting that aside, what about issues  
7 about whether or not there really was a common pay practice or  
8 not? Why wouldn't they be entitled to due discovery of other  
9 employees to find out whether or not those other employees said  
10 there was a common pay practice?

11 **MS. HERNANDEZ:** That's a good question, and these  
12 actions -- as long as there is some suggestion that there may  
13 be, okay, that there may be putative plaintiffs that were  
14 subject to the same kind of policy of unpaid overtime and  
15 minimum wage, that should suffice, but, again, with -- if there  
16 is going to be the precertification discovery, it would be just  
17 on the basis of the Plaintiff and the Opt-In Plaintiff to  
18 determine whether or not they -- the Opt-In Plaintiff was  
19 subject to the same pay policies that the Plaintiff has alleged  
20 in her complaint.

21 **THE COURT:** Okay. Ms. Cline, I will let you put  
22 anything you want on the record. I guess, first, I would want  
23 to know, though, do you have any authority for the idea that  
24 there should be discovery about these kind of equitable  
25 defenses to certification that you described? I have not been



1 able to locate any.

2           **MS. CLINE:** Your Honor, there are some cases  
3 involving class certification in which the parties have been  
4 permitted to discover and object to the class certification  
5 process because of equitable conduct and recruitment and other  
6 misconduct.

7           **THE COURT:** So discovery at the conditional  
8 certification stage about these kind of equitable matters?

9           **MS. CLINE:** Well, Your Honor, the -- there's been --  
10 there are cases about class certification and the challenge to  
11 class certification based on the conduct of counsel and other  
12 improper recruitment.

13           **THE COURT:** What about in the context of a collective  
14 action?

15           **MS. CLINE:** I don't have any authority on that point.

16           **THE COURT:** All right. And aren't the standards a  
17 little bit different?

18           **MS. CLINE:** Yes, they are, Your Honor.

19           **THE COURT:** All right. And then if I was to find  
20 that, for purposes of conditional certification, it would be  
21 premature to engage in that sort of discovery that you  
22 described, is there other discovery that you would want to do  
23 pertaining to conditional certification?

24           **MS. CLINE:** Yes, Your Honor. We have made -- as I  
25 agree with Ms. Hernandez, I made very serious allegations based

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1 on a good-faith belief that I have now gotten further due  
2 diligence on. We believe that the allegations we've made about  
3 recruitment of the potential Opt-In Putative Plaintiffs is very  
4 serious and goes to the integrity of this entire action of,  
5 certainly, my clients' defense; but, as my affirmative defense  
6 and our responses indicated, we believe that counsel and  
7 Plaintiff have engaged in oral solicitations of Putative  
8 Plaintiffs involving the payment of cash and the offer of  
9 immigration services in exchange for participation in this  
10 collective action.

11 **THE COURT:** Right, but my question was -- putting  
12 that aside, if I was to decide that at the conditional  
13 certification stage, we are not going to have discovery into  
14 those kind of equitable defenses, my question was is there  
15 separate -- any separate kind of discovery that you would want  
16 to do that pertains to the conditional certification issue?

17 **MS. CLINE:** Yes, Your Honor. I would certainly want  
18 to depose and speak to the Plaintiff and Opt-In Plaintiff about  
19 their contentions about the similarity of their positions and  
20 other criteria for collective action certification.

21 **THE COURT:** All right. And how long would you want  
22 to do that?

23 **MS. CLINE:** Well, Your Honor, Ms. Hernandez and I  
24 have sort of cross reports. The initial report that  
25 Ms. Hernandez shared with me contemplated that she would file

1 her motion for certification within 45 days after the  
2 scheduling order of this Court; and based on that  
3 understanding, Your Honor, I had suggested 45 days for the  
4 initial equitable discovery. Now that she has already filed  
5 her motion for conditional certification, Your Honor, I think I  
6 would need at least 60 days to conduct any kind of  
7 precertification discovery.

8 **THE COURT:** And even if that was limited only to sort  
9 of factual issues that pertained to the conditional  
10 certification determination and not include any of these  
11 equitable defenses that you have proffered?

12 **MS. CLINE:** Yes, Your Honor, I mean, I would seek 60  
13 days.

14 **THE COURT:** And then you would want to file your  
15 response to the motion for conditional certification after that  
16 60-day period?

17 **MS. CLINE:** Yes, Your Honor.

18 **THE COURT:** All right. Do you -- are there any other  
19 issues relevant to establishment of the scheduling order or the  
20 proper way forward that you wanted to address at this point?

21 **MS. CLINE:** Other than what we have already, you  
22 know, argued, Your Honor. I do seek discovery on the equitable  
23 issues.

24 **THE COURT:** I understand that; but separate and apart  
25 from that, are there any other differences in the planning for

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1 a schedule that we should discuss at this time?

2 **MS. CLINE:** I am not aware of any, Your Honor.

3 **THE COURT:** Thank you. Ms. Hernandez, anything  
4 further you want to say?

5 **MS. HERNANDEZ:** Well, Your Honor, as -- I just want  
6 to clarify a couple of points.

7 If the Court is going to permit some sort of limited  
8 precertification discovery with respect to the opt-in  
9 putative -- I'm sorry -- with respect to the Opt-In and Named  
10 Plaintiff, that there should also be, at the very outset, some  
11 sort of limitation in terms of addressing Plaintiff's motion  
12 for protective order because, again, of the retaliatory conduct  
13 that has been already done to the Named Plaintiff in this  
14 action and, you know, given that the federal U.S. Department of  
15 Labor has, you know, conducted an investigation. The findings  
16 of that investigation still have not been released, but there  
17 have also been -- immediately after the Plaintiff was arrested,  
18 there was an application or a request for certification of a U  
19 visa that was also made upon the U.S. Department of Labor, and  
20 that sort of -- just give me a minute, Your Honor.

21 So the Wage and Hour Division has the authority to  
22 certify applications for U nonimmigrant visas pursuant to the  
23 Victims of Trafficking and Violence Protection Act of 2000.  
24 The Wage and Hour Division did, in fact, certify the U visa on  
25 the basis that the victim, Plaintiff Martinez, is likely to be

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1 helpful in the investigation or prosecution of the qualifying  
2 criminal activity of which she has been a victim. One would be  
3 witness tampering under 18 U.S.C. Section 1512(b)(1) and, two,  
4 extortion under North Carolina General Statute, Section  
5 14-118.4. And Plaintiff's U visa was approved on February 11,  
6 2015.

7 Again, very, very, serious issues going on in this  
8 case, Your Honor, and to the extent that there can be some  
9 limitations in terms of the communications, threats, coercion  
10 --

11 **THE COURT:** But it sounds like, from what you are  
12 saying, she has legal status?

13 **MS. HERNANDEZ:** She has correctly -- I'm sorry --  
14 correct. She has temporary legal status because the U visa has  
15 already been certified, but it hasn't been entirely completed.  
16 There is, like, a two-year waiting list before ICE will  
17 actually give her the final permanent residency.

18 **THE COURT:** Right, but she is not subject to removal  
19 at this point?

20 **MS. HERNANDEZ:** She is not, but the concern is not  
21 just about her anymore, Your Honor. It is about the Putative  
22 Plaintiffs that are similarly situated because the Putative  
23 Plaintiffs that worked with her in the kitchen have immigration  
24 issues.

25 In fact, as you can see from the Defendants' answer,

Martinez-Solais v. D'Abbusco Pretrial conf. 6/29/15

1 the 26(f) report, these constant accusations that Plaintiff's  
2 counsel has made promises of pecuniary gain, which is  
3 ridiculous because this case is about people that haven't been  
4 paid their wages, overtime and minimum wage. And then,  
5 secondly, the issue of immigration services, it's because the  
6 Defendant understands he was hiring, to his advantage,  
7 undocumented individuals to pay them very low wages and then,  
8 simultaneously, when they were trying to exercise their rights,  
9 using that very same advantage against them offensively, Your  
10 Honor, or defensively, if you will.

11 **THE COURT:** I understand. My point was that if we  
12 have a limited discovery prior to conditional certification, it  
13 would appear that it would be directed at the Named Plaintiff  
14 and one Opt-In Plaintiff, and then the Named Plaintiff now has  
15 protection against removal and so presumably understands that  
16 she's not subject to deportation.

17 What about the -- what is the situation with the  
18 Opt-In Plaintiff?

19 **MS. HERNANDEZ:** With the Opt-In Plaintiff, Your  
20 Honor -- and that's actually an excellent, excellent question  
21 because during the course of the Department of Labor's  
22 determination of granting the U visa certification, it is their  
23 responsibility to investigate the circumstances and to  
24 interview other putative plaintiffs to determine what their  
25 circumstances were. In addition to the Department of Labor's

1 investigation of retaliation, they will interview other  
2 putative plaintiffs; and I think that's where the Defendant is  
3 distorting all of these facts to accuse me of somehow engaging  
4 in this improper solicitation.

5 But to answer your question, Your Honor, the U.S.  
6 Department of Labor is considering a U visa for other Putative  
7 Plaintiffs and the Opt-In Plaintiff, Mr. Alvarado, but I think  
8 what I am referring to is, okay, we have the protection for the  
9 Named Plaintiff. The Opt-In Plaintiff is still not entirely  
10 protected. Then you have the Putative Plaintiffs. The  
11 potential threat and coercion against those individuals, any  
12 sort of language that indicates look what happened to her, and  
13 if you think about getting involved, the same thing will happen  
14 to you, when they have not been given any protection at this  
15 point from the Department of Labor.

16 **THE COURT:** Well, obviously, you filed your motion,  
17 and your motion will be addressed. I don't know whether it's  
18 going to be referred to me to be addressed or not at this  
19 point.

20 In terms of fashioning any kind of order as it  
21 relates to discovery regarding the conditional certification  
22 issue, it seems like that at this point the Named Plaintiff at  
23 least has protection from those kinds of concerns, but -- so at  
24 this point, I don't know really if I am going to have a role in  
25 addressing the emergency motion that you filed or not. I mean,

1 it's styled as a protective order, but it is really not a  
2 discovery type of protective order. It is something different  
3 from that, at least in most of its respects. So I will -- if  
4 it's referred to me, then I will address it.

5 It does strike me, Ms. Cline, that it may be  
6 appropriate to shorten the response time on that motion. What  
7 do you say about that?

8 **MS. CLINE:** Well, Your Honor, you know, I want to  
9 address -- first of all, I just want to state for the record  
10 that I disagree with almost everything Ms. Hernandez has said  
11 about the facts, but leaving that aside, you know, we have  
12 very -- I mean, I'm -- Ms. Hernandez's motion was filed Friday  
13 night. I was out of town and had not even reviewed that with  
14 my client until yesterday. I would certainly seek the full  
15 time, Your Honor, because the motion is very extensive. There  
16 are a number of declarants, and I would seek the full time in  
17 response.

18 **THE COURT:** All right. Well, I am going to take a  
19 look at that and determine whether or not the time should be  
20 shortened on that motion. I also will take a look at the case  
21 law about discovery regarding conditional certification, and I  
22 will enter an order as quickly as I can.

23 Anything further you want to say, Ms. Hernandez?

24 **MS. HERNANDEZ:** No, Your Honor, other than -- yes, I  
25 mean, there is a plethora of authority supporting the motion



1 for conditional certification, and the fact that the Plaintiff  
2 has already filed it, it makes beautiful sense to go ahead and  
3 start briefing that. And then also the motion for protective  
4 order, again given the severity of the circumstances and the  
5 very unique issues here, if that could be briefed on an  
6 expedited basis, that would also be wonderful, and it would  
7 protect the Putative Plaintiffs as well as the Opt-In  
8 Plaintiff, Your Honor. Thank you so much.

9 **THE COURT:** All right. Anything else, Ms. Cline?

10 **MS. CLINE:** No, Your Honor. I would simply suggest  
11 that -- I agree with Ms. Hernandez that there is certainly case  
12 law that suggests that this stage be a lenient one. This is  
13 not your usual case, and I cannot imagine that -- I would  
14 certainly contend that the standards are not this lenient in  
15 this kind of case.

16 **THE COURT:** All right. I will take a further look at  
17 that and try to get an order out as quickly as I can.

18 (END OF PROCEEDINGS AT 10:23 A.M.)

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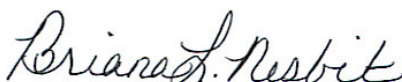
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2 MIDDLE DISTRICT OF NORTH CAROLINA

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7 certify that the foregoing transcript is a true and correct  
8 transcript of the proceedings in the above-entitled matter.

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10 Dated this 13th day of July 2015.

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14 Briana L. Nesbit, RPR  
15 Official Court Reporter  
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